IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

ROY E. AMMOND,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
and
H. F. EMERSON,
Respondents.

BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF FACTS

The Petitioner's cause of action arose by reason of the fact that the automobile in which he was riding as a passenger on the 25th day of May, 1938, was struck by a train of The Pennsylvania Railroad Company, which train was being operated by H. F. Emerson, the engineer, a resident of Ohio.

This crossing accident occurred in Stark County, Ohio, and as a result of the injuries which the Petitioner received, he filed an action against The Pennsylvania Railroad Company and H. F. Emerson, the engineer, as joint tort feasors by reason of and under authority of General

Code, Section 8856, of the statutes of the State of Ohio, which reads as follows:

> "LIABILITY OF COMPANY. The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person."

The action of the Petitioner seeking judgment against the Respondents for personal injuries was filed by said Petitioner, a citizen of Ohio, in the Common Pleas Court of Stark County, Ohio on March 24, 1939; service was made upon both The Pennsylvania Railroad Company, a citizen of the State of Pennsylvania, and H. F. Emerson, a citizen of the State of Ohio; service of process being made under the jurisdiction of the Common Pleas Court of Stark County, Ohio.

Thereafter and before answer day, and within the time required by law, The Pennsylvania Railroad Company, on April 19, 1939, filed a petition for removal, together with a bond for removal, in the Common Pleas Court of Stark County, Ohio, alleging improper joinder of parties defendant; said petition for removal came on for hearing before one of the judges of the Common Pleas Court of Stark County, Ohio; and, after a hearing in open court on April 21, 1939, said petition for removal from the Common Pleas Court of Stark County, Ohio, to the United States District Court for the Northern District of Ohio, Eastern Division, was denied; the Court of Common Pleas of Stark County, Ohio, held that it had jurisdiction of the parties and subject matter and refused to surrender its jurisdiction.

Immediately thereafter counsel for the Respondents procured certified copies of all the pleadings of the cause of action then pending in the Common Pleas Court of Stark County, Ohio, together with the order of the Common Pleas Court refusing to surrender jurisdiction, and filed all of said papers in the Clerk's Office of the United States District Court at Cleveland, Ohio.

Notice of this attempted removal by the Respondents was served upon Petitioner's counsel, and thereupon Petitioner filed a motion to remand, together with a brief in support thereof, with the Federal District Court at Cleveland, Ohio, which motion to remand was overruled on September 21, 1939, by the Federal District Court which claimed that it had jurisdiction of the subject matter and parties.

The cause of action pending in the Common Pleas Court of Stark County, Ohio, with the original papers thereto, was assigned for trial on the 19th day of March, 1940, and both Petitioner's and Respondents' counsel received notice of the assignment of said case for trial, ten days prior to the date set for hearing.

On the 19th day of March, 1940, the Respondents and their counsel failed and refused to appear for trial in the Common Pleas Court of Stark County and the trial proceeded to a determination before a Court and Jury, and at the conclusion of the evidence and the charge of the Court, the jury after deliberation returned a verdict for Petitioner.

On March 23rd, 1940, no motion for a new trial having been filed by the Respondents, the Clerk of Courts of Stark County entered the judgment for Petitioner on the verdict as required by law.

Thereafter, on April 16th, 1940, the Petitioner caused an execution to be issued on said judgment, directed to the Sheriff of Stark County, Ohio, for the purpose of the enforcement and collection of the judgment recovered by the Petitioner against the Respondents in the cause of action in the Common Pleas Court of Stark County, Ohio.

After the writ of execution had been delivered by the Clerk of Courts to the Sheriff of Stark County, Ohio, the Respondents filed a motion on May 2nd, 1940, in the said Federal District Court of Cleveland, Ohio, based upon a supplemental complaint, asking the Federal District Court for an order directed to Petitioner to show cause on May 10th, 1940, why said Petitioner should not be enjoined from proceeding by execution or otherwise to collect said Petitioner's judgment from the Respondents.

After a hearing in open court on May 10th, 1940, the Federal District Court enjoined Petitioner and Petitioner's counsel from proceeding by execution or otherwise to collect the judgment which said Petitioner had recovered in the Common Pleas Court of Stark County, Ohio. This order of the Federal District Court was Journalized and filed on July 10th, 1940.

On September 12, 1940, Petitioner filed a Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit, together with a Statement of Points to be Relied Upon and the Designation of Contents of Record on Appeal. Thereafter and following the filing of briefs, the cause was argued and submitted on December 11, 1941.

The Circuit Court of Appeals for the Sixth Circuit, on February 10, 1942, entered its decree affirming the decree previously entered by the District Court of the United States for the Northern District of Ohio.

Petitioner's contentions based upon the foregoing statement of facts, are:

(1) That the District Court was in error in assuming jurisdiction over the cause and in overruling Petitioner's Motion to Remand, because the State Court held there was not a separable controversy between citizens of different states, and the District Court was bound by such holding;

(2) That the District Court erred in enjoining Petitioner from proceeding to enforce his judgment rendered in the State Court, because the District Court was without power to do so; and

(3) That the Circuit Court of Appeals erred in affirming the decree of the District Court.

ASSIGNMENTS OF ERROR

I. The District Court erred in assuming jurisdiction over the cause and in overruling Petitioner's Motion to Remand, because the State Court held there was not a separable controversy and the District Court was bound by such holding.

II. The District Court erred in enjoining Petitioner from proceeding to enforce his judgment rendered in the State Court, because the District Court was without power to do so.

III. The Circuit Court of Appeals erred in affirming the decree entered by the District Court.

ARGUMENT

Assignment of Error No. I.

The Federal Statute involved in the first assignment of error is Section 28 of the Judicial Code (28 U. S. C., Sec. 71), and the part involved herein is as follows:

"Removal of Suits from State Courts. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given jurisdiction by Part I of this title, in any State Court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, by Part I of this title, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between, them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district." Etc.

The Statutes of the State of Ohio involved in this question are General Code, Sections 8853 and 8856, which read as follows:

Sec. 8853. "Signals at Railroad Crossings. Every company shall attach to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle. When an engine in motion and approaching a turnpike, highway or town road crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve or other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, the engineer or person in charge thereof, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from

such crossing, and ring such bell continuously until the engine passes the crossing."

Sec. 8856. "LIABILITY OF COMPANY. The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person."

From the petition filed in the State Court (R. p. 2, 3), it appears that the Respondent, The Pennsylvania Railroad Company, is for purpose of diversity of citizenship, a citizen of the Commonwealth of Pennsylvania, and the Respondent, H. F. Emerson, the engineer of the train involved in the collision, is a citizen of the State of Ohio. The petition charged both Respondents with failure to obey the Statutes of Ohio, and more particularly Section 8853 of the Ohio General Code, in connection with the duty imposed as to bell and whistle signals required to be given at a crossing.

The theory that Petitioner proceeded upon in the State Court was that Section 8856 of the Ohio General Code authorized, in a negligence action, the joinder of the railroad company and the engineer as parties defendant. If petitioner's theory was correct—and the State Court so held—the railroad company and the engineer were joint tort feasors and there was no separable controversy "wholly between citizens of different states" as required by Section 28 of the Judicial Code as a prerequisite to the right of removal to the District Court.

In order to justify removal of a cause from a State Court to the District Court on the ground of a separate controversy between citizens of different states, the whole subject matter of the suit must be capable of being fully

determined as between them, and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit.

Hyde v. *Ruble,* 104 U. S. 407;
Winchester v. *Loud,* 108 U. S. 130;
Brown v. *Trousdale,* 138 U. S. 389;
Torrence v. *Shed,* 144 U. S. 527;
Roberts v. *Underwood T. Co.,* (D. C.—N. J.), 257 Fed. 583.

If the Petitioner's theory was correct—and the State Court so held—neither the motive of Petitioner in joining the railroad company and the engineer as parties defendant, nor his purpose in so doing can be questioned. The choice of whether to sue one or both would lie entirely within the prerogative of Petitioner. This has been determined and stated many times.

Cincinnati, New Orleans and Texas Pacific Railroad Company v. *George Bohon, Admr. of Edward Cook, Dec'd and Fred Milligan,* 200 U. S. 221;
Alabama Great Southern Railway Co. v. *H. C. Thompson, Admr. of Florence James, Dec'd,* 200 U. S. 206;
Chesapeake and Ohio Ry. Co. v. *Cockrell, Admr.,* 232 U. S. 146;
Southern Ry. Co. et al. v. *Miller,* 217 U. S. 209;
Ill. Central R. R. Co. v. *Sheegog,* 215 U. S. 316;
Chicago, R. I. & P. R. Co. v. *Whiteaker,* 239 U. S. 421.

The mere epithet of fraudulent joinder of Respondents contained in the Petition to Remove, filed by Respondents, does not create a case of fraudulent joinder. *Chesapeake & Ohio Railway Co.* v. *Cockrell, Admr.,* 232 U. S. 146, Syllabus 2:

"The right of a non-resident defendant to remove the case cannot be defeated by the fraudulent joinder

> of a resident defendant; but the defendant seeking removal must allege facts which compel the conclusion that the joinder is fraudulent; merely to apply the term 'fraudulent' to the joinder is not sufficient to require the state court to surrender its jurisdiction."

If Petitioner had the right to join Respondents, the fact that he did so could not be fraudulent merely because the non-resident defendant would thereby be prevented from removing the case from the State Court to the District Court.

THE STATE COURT PROPERLY DENIED RESPONDENTS' PETITION TO REMOVE

The question before the State Court was whether, on the face of the record, a case for removal had been made. Until Respondents could make a showing on the face of the record that there was a proper case for removal, it was the duty of the State Court to proceed with the cause. See *Stone* v. *South Car.*, 117 U. S. 430, Syllabus 1:

> "A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which, on its face, shows that the petitioner has a right to the transfer; and if it decides against the removal and proceeds with the cause, its ruling is reviewable here after final judgment."

A further statement can be found in *Madisonville Traction Company* v. *St. Bernard Min. Co.*, 196 U. S. 239, at page 245, wherein this court said:

> "It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the State Court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made."

The State Court was thus met at the outset with the problem of determining whether there was, as a matter of law, such a separable controversy as to give Respondents the right of removal. Separability of controversies is governed by state law. *Alabama Great Southern R. Co.* v. *Thompson,* 200 U. S. 206; *Chicago, R. I. & Pacific R. Co.* v. *Schwyhart,* 227 U. S. 184.

The Court of Common Pleas of Stark County, Ohio, in denying the petition for removal, filed by the Respondent, The Pennsylvania Railroad Company, relied upon Section 8856 of the Ohio General Code. The State Court, by denying the petition for removal, held that Respondents were joint tort feasors, and since the Respondent, H. F. Emerson, was a citizen of Ohio, there was not a separable controversy wholly between citizens of different states.

This interpretation of the Ohio statute by the Court of Common Pleas of Stark County, Ohio, is the first interpretation such statute has received. There are two reported cases decided by the Supreme Court of Ohio, dealing with the joinability of masters and servants in general. They are *Clark* v. *Fry,* 8 O. S. 358, and *French, Admr.* v. *Construction Company,* 76 O. S. 509.

The rule announced by these two cases is that a master and servant cannot be sued jointly. But neither case was a railroad case. In neither case was Section 8856, Ohio General Code, discussed. The reason for this should be obvious. There would be no occasion to interpret such section because in neither case was a railroad involved and thus in neither case would the statute apply, also both cases were decided prior to the enactment of Section 8856.

Here then, is the first and only interpretation by an

Ohio State Court of an Ohio statute and we submit that the District Court was bound by such interpretation. *West* v. *A. T. & T. Co.,* 311 U. S. 223. And see *MacGregor* v. *State Mutual L. Assur. Co.,* decided February 16, 1942, 86 Law. Ed. 559. "Where the applicable rule of decision is the state law, the duty of the federal court is to ascertain and apply that law even though it has not been expounded by the highest court of the state." *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, Syllabus 1.

There have been two federal cases originating in Ohio, both of which involved railroads, holding that the railroad and the servant could not be sued jointly. *Robbins* v. *Penna. R. Co.,* 245 Fed. 435 (C. C. A. 6th); *Galehouse* v. *B. & O. R. Co.,* 274 Fed. 370 (D. C. Ohio).

It is submitted, however, that these cases were erroneously decided because both followed *Clark* v. *Fry,* and *French, Admr.* v. *Construction Company,* both supra. As pointed out above, neither of these two latter cases was a railroad case, and in neither was Section 8856 discussed.

Furthermore, under the *West case,* supra, the District Court was bound to follow the State Court's interpretation notwithstanding the fact that to do so would involve a departure from prior decisions of federal courts.

Syllabus 2 of the West case, supra, is as follows:

> "A rule announced and applied by state courts as the law of the State, though not passed on by the highest state court, may not be rejected by a federal court because it thinks that the rule is unsound in principle or that another is preferable."

Syllabus 3 of the West case, supra, is as follows:

> "In deciding local questions it is the duty of the federal court to ascertain from all available data

> what the state law is, and apply it, however superior a different rule may appear from the viewpoint of general law and however much the state rule may have departed from prior decisions of the federal courts."

It is submitted, therefore, that the District Court was bound by the interpretation of the statute as determined by the state court, and that it erred in assuming jurisdiction of the cause and in overruling Petitioner's motion to remand.

Assignment of Error No. II.

THE DISTRICT COURT ERRED IN ENJOINING PETITIONER FROM PROCEEDING TO ENFORCE HIS JUDGMENT RENDERED IN THE STATE COURT BECAUSE THE DISTRICT COURT WAS WITHOUT POWER TO DO SO.

The federal statute involved in this assignment of error is Section 265 of the Judicial Code (28 U. S. C. 379), which provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

If the Petitioner's theory concerning the joinability of the Respondents was correct, then, of course, it is clear that the District Court had no injunctive power. But assuming for purpose of argument, that the District Court was not bound by the Ohio State Court's interpretation of the Ohio Statute, we submit that even under those circumstances the Respondents were not entitled to injunctive relief. Their remedy was by way of appeal through the State Courts.

This Court recently reviewed the question of removability in *Metropolitan Casualty Co.* v. *Stevens,* 312 U. S. 563. At page 567 the Court says:

> "When a petition for removal to a federal court is denied by the State Court, the petitioner may do one of three things. He may object to the ruling, save an exception, and litigate the cause in the state courts. (Citing cases.) He may remove the suit to the federal court despite the ruling of the state court. (Citing cases.) He may proceed in both courts at the same time. (Citing cases.)"

If Respondents, under the assumed statement of facts, could get injunctive relief, such procedure would mean that a petitioner could do one of *four* things, instead of *three,* as outlined in the *Stevens Case,* supra. In addition such procedure would be in the teeth of Section 265 of the Judicial Code, supra. Petitioner is, of course, cognizant of the cases beginning with *French* v. *Hay,* 22 Wall. 250. We would, however, like to call the Court's attention to *Chesapeake and Ohio Railway Co.* v. *A. E. White, Admr.,* 111 U. S. 134, wherein the syllabus is as follows:

> "When a cause is properly removed from a State Court to a Federal Court, and the State Court nevertheless proceeds with the case, and forces to trial the party on whose petition the removal was made, the proper remedy is by writ of error after final judgment, and not by prohibition or punishment for contempt."

So far as Petitioner can determine, this case has never been overruled, unless it may be said to be overruled as a necessary inference by *Madisonville Traction Co.* v. *St. Bernard Min. Co.,* 196 U. S. 239.

We urge that the *Stevens Case,* supra, is the most re-

cent pronouncement by this Court, and in view thereof, the dictum contained in *Samuel R. Toucey* v. *New York Life Ins. Co.*, decided November 17, 1941, cannot be controlling.

For the foregoing reasons, we submit that the remedy of Respondents was by way of appeal in the State Courts. Such a course would adequately protect their rights.

Assignment of Error No. III.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT.

The arguments advanced under the first and second assignments of error are the same arguments in support of this third assignment of error, and will not be repeated. But for the same reasons therein advanced, we submit that the Circuit Court of Appeals erred in affirming the decree of the District Court and that therefore this Court should grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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